

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2012/CLE/gen/FP/00384

BETWEEN

ALEXANDER INGLIS AND SON LIMITED  
Plaintiff

AND

T. MAITLAND CATES  
(As Trustee of the shares of Stonegarth Ltd)  
1<sup>st</sup>Defendant

And

ELLISON J. DELVA  
(As Trustee of the shares of Stonegarth Ltd)  
2<sup>nd</sup>Defendant

And

STONEGARTH LIMITED  
3<sup>rd</sup>Defendant

AND BETWEEN

T. MAITLAND CATES

(As Trustee of the shares of Stonegarth Ltd)

1<sup>st</sup> Plaintiff in Third Party Proceedings

And

ELLISON J. DELVA

(As Trustee of the shares of Stonegarth Ltd)

2<sup>nd</sup> Plaintiff in Third Party Proceedings

AND

BLAIR CARNEGIE NIMMO

(Trustee in Bankruptcy of the Estate of Malcolm Scott)

1<sup>st</sup> Third Party

AND

RONA SCOTT

2<sup>nd</sup> Third Party

BEFORE

The Hon. Mrs. Justice Estelle GrayEvans

APPEARANCES:

Ms Lanecia Darville for the plaintiff

Mr Terry North for defendants

Mrs Simone Morgan-Gomez for the first third party

HEARING DATES:

2014: 22 September

**RULING**

Gray Evans J.

1. On 4 July 2013 this Court granted leave to the plaintiff to enter judgment in default of defence against the first and second defendants for specific performance of a trust deed hereinafter described and reserved its decision on the issue of costs.

2. This is that decision.

3. By two declarations of trust dated 14 September 2011 the first and second defendants declared that each of them held 2500 shares in the third defendant upon the following trusts:

“To transfer the same into the name of

1. Alexander Inglis and Son Limited, a company registered in Scotland with registered number SC027806 and having its registered office address at Meadow Stores, Ormiston, Tranent, East Lothian, EH3 5NG until such time as the loan and debts from Alexander Inglis and Son Limited to Malcolm Scott is repaid in full.

And on repayment of the loan and debts (1. above) for:

2. Malcolm Scott and Rona A. Scott as joint tenants”(hereinafter referred to as “the Beneficial Owner”) when called upon by his (or his lawful appointed Attorney) to do so or such other person or persons as directed by him and as permitted by the Articles of Association of the said company;

To hold any fully paid share(s) which may be issued by way of a capitalization issue in respect of my said holding upon the same trust as declared in paragraph 1 above.”

4. By letter dated 5 October 2012, counsel for the plaintiff wrote to the first and second defendants demanding that each of them transfer the 2500 shares in the third defendant held in trust by them into the name of the plaintiff as beneficiary in accordance with the trust document within seven days of the date of the letter, failing which the plaintiff threatened to commence legal action to enforce the trust deed.

5. The first and second defendants did not comply with the demand and by a further letter, dated 9 November 2012, counsel for the plaintiff informed the first and second defendants of its intention to commence legal action without further reference to them, warning them of the associated costs in the event such action was commenced.

6. The first and second defendants still did not comply with the demand.

7. The plaintiff then commenced this action on 19 November 2012, by a generally indorsed writ of summons seeking, inter alia, specific performance of the aforesaid trust deeds, or a vesting order. The plaintiff’s statement of claim was filed on 17 January 2013.

8. The first and second defendants entered appearance on 30 November 2012 and although the parties had agreed to an extension of the time within which the first and second defendants were to file and serve their defence, no defence was filed by or on their behalf.

9. By order made on 4 July 2013 leave was granted to the plaintiff to enter judgment in default of defence for specific performance of the aforesaid trust deeds; that is, for the transfer of the shares in the third defendant, the subject of the aforesaid declarations of trust, to the plaintiff pursuant to the terms of the trust.

10. The costs of the application for judgment as well as the costs of the action were reserved to enable the first and second defendants to issue third party proceedings against Blair

Carnegie Nimmo, Trustee in Bankruptcy of Malcolm Scott, first third party and Rona Scott, second third party, conditional beneficiaries of the aforesaid trusts.

11. A third party notice was issued on 9 August 2013. The notice was served on the first third party on 8 November 2013 and appearance entered on his behalf on 20 November 2013.

12. By that notice, the first and second defendants claimed against the first and second third parties to be indemnified against the plaintiff's claim for, inter alia, damages, payment of the stamp duty to effect the share transfer and costs or contribution to the extent of 100% thereof on the grounds that the first and second defendants:

- (1) Held the shares as nominees for the Bankrupt, Malcolm Scott and the Bankrupt's wife, Rona Scott, prior to the said Malcolm Scott being adjudged a bankrupt.
- (2) The said Malcolm Scott on behalf of himself and his wife, Rona Scott, instructed the first and second defendants not to execute the transfer of shares in favour of the plaintiff as a dispute had arisen between them.
- (3) As at the 1<sup>st</sup> May 2012 when the said Malcolm Scott was adjudged a Bankrupt in Scotland, title of his shares vested in the said Blair Nimmo as the Trustee in Bankruptcy

13. It is accepted that no party is entitled to recover costs of or incidental to any proceedings except under the authority of the Court, which has sole discretion in granting costs: See Rules of the Supreme Court (RSC) Order 59, rules 3(1) and 3(2), the latter of which also provides that in the exercise of its discretion, the Court shall order the costs to follow the event, except it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs.

14. The plaintiff seeks its costs of the application and the action.

15. In light of the aforesaid rules, costs should follow the event. The plaintiff, having succeeded in its application for judgment in default of defence against the first and second defendants, is entitled to the standard costs order.

16. However, the first and second defendants say that, given the inaction of Mr and Mrs Scott, and then the first third party, to give the first and second defendants clear instructions in this matter, resulting in judgment in default of defence being entered against them, the justice of the case requires that the Court exercise its discretion in their favour and order the third parties to pay the first and second defendants' costs as well as the costs of the plaintiff, or to indemnify the first and second defendants against payment of such costs.

17. The first third party resists the first and second defendants' application for indemnity and or payment by the first third party of any costs associated with these proceedings and, instead, seeks an order that the first and second defendants pay the first third party's costs herein.

18. While a trustee can get personal indemnity from a beneficiary either by means of a contract wherein the beneficiary expressly agrees to indemnify the trustee, there is no evidence that the Scotts had expressly agreed to indemnify the first and second defendants as trustees.

19. Moreover, it is clear from the language of the aforesaid declarations of trust that the Scotts were not absolute beneficiaries of the aforesaid trust and, therefore, there was no obligation on them to provide a personal indemnity to the trustees. See *Hardoon v Belilios* [1901] AC 118 PC.

20. In any event, as pointed out by counsel for the first third party, the first and second defendants cannot claim to be bare trustees for Malcolm Scott, since, from 14 September 2011, the date of the execution of the trust deeds, the primary beneficiary of the trust was the plaintiff while the Scotts were only conditional beneficiaries.

21. Furthermore, although the trustee in bankruptcy had been appointed prior to the execution of the trust deed, he was not a party thereto and there is no evidence that instructions with regard to the transfer of shares to the plaintiff were sought or obtained from him. Therefore, I agree with counsel for the first third party that as the first third party was not a party to the trust deed and did not instruct the first and second defendants not to execute the transfer of shares to the plaintiff, the first third party should not be held liable for the first and second defendants' costs herein.

22. In the result, I find that the first third party is not responsible for the costs ordered to be paid by the first and second defendants herein, nor is the first third party responsible for the payment of the first and second defendants' costs in the original action or in the third party proceedings.

23. Moreover, I accept the submission of counsel for the first third party and find that the first and second defendants ought, in addition to paying the plaintiff's costs herein, also pay the first third party's costs in the third party proceedings.

24. Counsel for the first third party submits that the costs ordered to be paid by the first and second defendants may be ordered to be paid by them and reimbursed from the trust or by them personally.

25. Counsel for the plaintiff submits that in failing and or refusing to carry out the express terms of the trust, that is, to transfer the aforesaid shares to the plaintiff when called upon by the plaintiff as beneficial owner under the trust deeds to do so, the first and second defendants acted unreasonably and "purely" for their own benefit.

26. Moreover, counsel submits, in seeking to deprive the plaintiff as beneficiary from its rights in the trust estate, the first and second defendants have conducted themselves mala fide. They have not, she argues, demonstrated any lawful reasons for such deprivation nor did they take any legal steps to apply to the court for directions or leave to defend in an effort to protect the trust assets.

27. Moreover, counsel for the plaintiff submits, the costs ordered to be paid by the first and second defendants ought to be paid by them personally as, in her submission, such costs were improperly incurred and do not satisfy the O'Donoghue test, namely, that:

- (1) The cost arose from an act falling within the scope of the trusteeship;
- (2) It was a cost incurred because the trustees' obligations required it; and
- (3) In all the circumstances the expense incurred was reasonable.

(See Re O'Donoghue [1998] 1 NZLR 116)

28. In any event, counsel for the plaintiff submits that the actions of the first and second defendants necessitated the commencement of these proceedings for specific performance, therefore, they should be ordered to pay the costs herein personally, since a trustee will not be allowed to charge against the trust property the costs of unnecessary litigation. See Norris v Norris [1785] 1 Cox Eq Cas 183.

29. Counsel for the first and second defendants disagrees. In his submission, in light of the reasons proffered by the first and second defendants for not executing the transfer of shares prior to the commencement of this action, they acted reasonably and for the benefit of the trust fund; and in any event, they did not act mala fides.

30. RSC Order 59 rule 6(2) provides that where a person is or has been a party to any proceedings in the capacity of trustee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee; and the Court may otherwise order only on the ground that the trustee has acted unreasonably or, has in substance acted for his own benefit rather than for the benefit of the fund.

31. The evidence is that the declarations of trust were executed by the first and second defendants as an alternative to the execution of a mortgage requested by the plaintiff as security for its loan(s) to Malcolm Scott.

32. Having executed the declarations of trust, which were provided on the advice of the first defendant in an effort to save some of the costs associated with a mortgage, immediately the plaintiff called upon the first and second defendants to transfer the shares pursuant to the aforesaid declarations, they ought to have complied with the expressed terms of the trust. They did not. Not immediately, nor upon subsequent requests, notwithstanding one such request was accompanied by a warning about associated costs in the event litigation became necessary. Indeed, the first and second defendants did not effect the transfer of shares until after the judgment in default of defence for specific performance was entered against them.

33. As for why the first and second defendants failed and or refused to transfer the shares when requested by the plaintiff to do so, the first defendant in his affidavit filed 14 February 2013 avers, inter alia, as follows:

“Upon informing Mr Scott that the engrossed Mortgage was ready for execution, Mr Scott instructed me that Mr Delva and I were not to sign the same or execute the transfer of the shares in favour of the plaintiff in accordance with terms of the declarations.”

34. Then in his supplemental affidavit filed 2 July 2013 Mr Cates avers, inter alia, as follows:

“By an email dated the 10<sup>th</sup> June 2013, Mr North again communicated with Ms Thornber to update her on the proceeding in The Bahamas. Mr North also opined to her that the trustee should take an interest in the proceedings and should make application to be joined as a defendant in the action. Failing this, then the trustee should instruct Mr Cates and Mr Delva how he wished the shares to be dealt with.”

35. In my view, in light of the express terms of the trust deed, the first and second defendants seeking instructions from the conditional beneficiary and or the trustee in bankruptcy or either one of them was unreasonable and I accept the submission of counsel for the plaintiff that either they acted in the manner they did for their personal benefit or for the benefit of the Scotts, conditional beneficiaries, thereby, in my view, preferring one beneficiary over the other, rather than for the benefit of the trust. Had they acted for the benefit of the trust they would have complied with the terms thereof and transfer the shares to the plaintiff as he requested.

36. In the premises, I find that the first and second defendants in failing to transfer the shares to the plaintiff when requested so to do, acted unreasonably and that their actions necessitated the commencement of this action. Further, that even after the action commenced,

the first and second defendants, if they had a genuine concern or doubts as to who the beneficial owners of the shares were, although, in my view, they ought not to have any doubt having themselves recommended the execution of the declarations of trust in favour of the plaintiff, they should have sought the directions of the court. Instead, they not only entered an appearance but also sought and obtained the agreement of the plaintiff to an extension of the time to enter a defence, which they failed to do, resulting in judgment in default being entered against them, in addition to which they commenced third party proceedings against the first and second third parties.

37. If a trustee willfully refuses to do an act which is his duty to do in his position of trustee he can be compelled by a court of equity to do it (Lord Milsington v Earl of Mulgrave (1818) 3 Madd 491), and he may be ordered to pay the costs of any legal proceedings rendered necessary by his refusal. Jones v Lewis (1786) 1 Cox Eq. Cas 199. (Halsbury's Laws of England 4<sup>th</sup> edition, volume 48, para 920; A trustee will normally be ordered to pay the costs where he refuses or neglects to do his duty as trustee.

38. In this case, clearly the trustees' duty was to transfer the shares to the plaintiff in accordance with the declaration of trust. They failed to do so prior to the commencement of this action. While I note counsel for the first and second defendants' comments that immediately the order for judgment was made they effected the transfer, unfortunately, for them, that was, in my judgment, too late as by that time costs would have already been incurred by the unnecessary litigation commenced as a result of their unreasonable behavior.

39. It seems to me, therefore, that to allow the first and second defendants to recover their costs from the trust fund would mean that the plaintiff, the primary beneficiary, will effectively be paying for the action they were compelled to take because the first and second defendants as trustees, failed and or refused to comply with the express terms of the trust.

40. In the circumstances, it is hereby ordered that the costs ordered to be paid by the first and second defendants on the application for judgment in default of defence, the original action and the third party proceedings be paid by the first and second defendants personally, without indemnity or contribution from the trust fund.

Dated this 28<sup>th</sup> day of November A.D. 2014

Estelle G. Gray Evans

Justice